Bandar Nusajaya Development Sdn Bhd v Majlis Mesyuarat Kerajaan Negeri Johor & Ors

HIGH COURT (JOHOR BAHRU) — JUDICIAL REVIEW NO 25–145–12 OF 2012
GUNALAN MUNIANDY JC
26 MARCH 2014

Civil Procedure — Judicial review — High Court — Application to quash decision of Johor State Executive Council — Whether impugned decision in contravention of the Electricity Supply Act 1960 s 16(2) — Whether decision null and void

Civil Procedure — Judicial review — Jurisdiction — Future decisions — Whether court's jurisdiction in judicial review proceedings not extending to future or anticipated decisions

The applicant was the owner of certain parcels of land in Johor ('the lots'). Tenaga Nasional Bhd's ('TNB') proposed transmission line project included construction of electrical installations over the lots pursuant to the Electricity Supply Act 1960 ('ESA'). Pursuant to an inquiry held under s 11(6) of the ESA, the land administrator/second respondent ('LA') assessed the total compensation to be paid by TNB to the applicant for the encroachment into its land under s 16(1) of the ESA at RM11,426,555.75. Being dissatisfied with the award, the applicant invoked ss 11(7) and 16(2) of the ESA and applied to the first respondent ('EXCO') to review the award. The EXCO via its decision delivered on 6 February 2002 ('the first decision') increased the compensation payable by TNB to RM34,522,099. TNB subsequently appealed to the EXCO to revise the first decision. The appeal was purportedly allowed by the EXCO vide letter dated 2 April 2008 wherein the increase in the award was revised to a mere 30% which required TNB to merely pay additional compensation of only RM2,735.613 ('the second decision'). On 6 July 2009, the applicant wrote to the LA asking that the EXCO's first decision be maintained. In response, the EXCO vide its letter dated 26 October 2009 reverted to its first decision ('the third decision'). TNB then applied for judicial review against the EXCO's third decision and succeeded at the High Court in obtaining an order of certiorari to quash the decision. The applicant appealed against this decision to the Court of Appeal. Whilst pending the outcome of the Court of Appeal proceedings, the EXCO made a decision on 18 July 2012 to maintain its second decision ('the fourth decision'). No further inquiry/inquest was held by the EXCO before the fourth decision. Notwithstanding the fourth decision by the EXCO, the Court of Appeal reversed the High Court decision in favour of

the applicant thereby affirming the EXCO's first decision. Despite the Court of Appeal's decision in the applicant's favour ordering TNB to pay the original compensation awarded in the sum of about RM34.5m, the present judicial review proceeding was instituted to quash the EXCO's fourth decision. The thrust of the applicant's case was that any decision made under s 16(2) of the ESA is final without any proviso in the governing Act for further review. Accordingly, the applicant contended that the EXCO's first decision was final and any subsequent decision that was inconsistent with the first decision was null and void. TNB, on the other hand, contended that the fourth decision was not amenable to judicial review because at that time TNB's judicial review application against the third decision had been allowed by the High Court whilst the applicants' appeal to the Court of Appeal' had yet to be heard. Hence, the operative and binding decision then was the second decision. Hence, it was contended that as the High Court order was then effective and enforceable on the matter in dispute, not having been set aside on appeal, there was actually nothing left as it stood for the EXCO to decide on 18 July 2012.

Held, allowing the applicant's application in part:

(1) The EXCO made the impugned or fourth decision on 18 July 2012 on the compensation to be awarded to the applicant in respect of the project payable by TNB. As the decision was conveyed to the applicant in writing vide the relevant letter issued by the LA, it was for TNB to show to the contrary (see para 13).

(2) The facts fell squarely within the ambit of the relevant provisions of O 53 of the Rules of Court 2012 ('ROC') for reliefs to be sought in an application for judicial review. The impugned decision was clearly in contravention of s 16(2) of the ESA which states in clear and unequivocal terms that the decision of the state authority on an appeal from the LA's assessment shall be final (see paras 14–15).

(3) By making the impugned decision, the EXCO had committed a serious error of law by acting in contravention of s 16(2) of the ESA which was the law from which its decision making powers were derived. As a consequence, the impugned decision was invalid and of no legal effect. The decision was null and *void ab initio* (see para 23).

(4) With regard to the applicant's prayer seeking to declare void and nullify any decision that may be made by the EXCO in the future and not one that has already been made, the relief sought was a pre-emptive order that should not be made in a judicial review of the decision of an administrative or Executive authority. It clearly did not fall within the scope of a judicial review application as envisaged in O 53 r 2(4) of the ROC 2012 and ran counter to the purpose or intent of O 53. To be judicially reviewable in proceedings for certiorari and/or declaration,

there must be an actual existing decision complained of that the applicant wishes to challenge and not one that is anticipated would be made in the future (see para 24.

(5) In relation to the applicant's prayer seeking to prohibit any future decision of the EXCO that conflicted with the effect of its first decision that is final and conclusive, the prayer was not only vague but speculative in nature. The court's jurisdiction in judicial review proceedings does not extend to future or anticipated decisions of the executive authority which cannot be restrained from exercising the decision-making powers vested in it under the law (see para 24).

[Bahasa Malaysia summary

Pemohon merupakan pemilik beberapa bidang tanah di Johor ('tanah-tanah tersebut'). Tenaga Nasional Bhd ('TNB') mencadangkan satu projek transmisi aliran elektrik yang melibatkan pembinaan binaan-binaan elektrik ke atas tanah-tanah di bawah Akta Bekalan Elektrik 1960 ('ABE'). Di bawah inkuiri yang dijalankan di bawah s 11(6) ABE, pentadbir tanah/responden kedua ('PT') mentaksir pampasan yang perlu dibayar oleh TNB kepada pemohon bagi kemasukan ke dalam tanahnya di bawah s 16(1) berjumlah RM11,426,555.75. Tidak berpuas hati dengan award tersebut, pemohon membangkitkan ss 11(7) dan 16(2) ABE dan memohon kepada responden pertama ('EXCO') untuk menyemak award tersebut. EXCO melalui keputusannya pada 6 Februari 2002 ('keputusan pertama') menaikkan pampasan yang perlu dibayar oleh TNB kepada RM34,522,099. TNB seterusnya merayu kepada EXCO untuk menyemak keputusan pertama. Rayuan tersebut dibenarkan oleh EXCO melalui surat bertarikh 2 April 2008 yang menaikkan award yang disemak kepada hanya 30% yang mana memerlukan TNB membayar sekadar pampasan tambahan sebanyak RM2,735,613 ('keputusan kedua'). Pada 6 Julai 2009, pemohon menulis kepada PT memohon agar keputusan pertama EXCO dikekalkan. Sebagai respon, EXCO melalui suratnya yang bertarikh 26 Oktober 2009 kembali ke keputusan pertamanya ('keputusan ketiga'). TNB kemudiannya memohon semakan kehakiman terhadap keputusan ketiga EXCO dan berjaya di Mahkamah Tinggi dalam mendapatkan perintah certiorari untuk membatalkan keputusan tersebut. Pemohon merayu terhadap keputusan ini di Mahkamah Rayuan. Sementara menunggu keputusan prosiding Mahkamah Rayuan, EXCO membuat keputusan pada 18 Julai 2012 untuk mengekalkan keputusan keduanya ('keputusan keempat'). Tiada inkuiri/inkues selanjutnya dibuat oleh EXCO sebelum keputusan keempat. Tanpa mengira keputusan keempat oleh EXCO, Mahkamah Rayuan mengakas keputusan Mahkamah Tinggi berpihak kepada pemohon dan dengan itu mengesahkan keputusan pertama EXCO. Tanpa mengira keputusan Mahkamah Rayuan berpihak kepada pemohon mengarahkan TNB membayar pampasan asal yang diawardkan dalam jumlah RM34.5 juta, prosiding semakan kehakiman ini

dimulakan untuk membatalkan keputusan keempat EXCO. Tunjang kes pemohon adalah bahawa apa-apa keputusan yang dibuat di bawah s 16(2) ABE adalah muktamad tanpa sebarang proviso kepada Akta bagi semakan lanjut. Pemohon menghujahkan bahawa keputusan pertama EXCO adalah muktamad dan apa-apa keputusan seterusnya yang bertentangan dengan keputusan pertama ada batal dan tidak sah. TNB, sebaliknya, menghujahkan bahawa keputusan keempat tidak mematuhi permohonan semakan kehakiman terhadap keputusan ketiga yang telah dibenarkan oleh Mahkamah Tinggi manakala rayuan pemohon-pemohon ke Mahkamah Rayuan belum didengar. Oleh itu, keputusan operatif dan mengikat adalah keputusan kedua. Oleh yang demikian, dihujahkan bahawa oleh kerana perintah Mahkamah Tinggi adalah dengan itu efektif dan boleh dikuatkuasakan berkenaan hal perkara pertikaian, tanpa mengetepikan rayuan, tiada apa yang tinggal kerana ia kekal untuk EXCO untuk memutuskannya pada 18 Julai 2012.

Diputuskan, membenarkan sebahagian permohonan pemohon:

(1) EXCO membuat keputusan yang dipersoalkan atau keputusan keempat tersebut pada 18 Julai 2012 berkenaan pampasan yang perlu diawardkan kepada pemohon bagi projek yang perlu dibayar oleh TNB. Oleh kerana keputusan tersebut telah dimaklumkan kepada pemohon secara bertulis melalui surat yang relevan yang telah dikeluarkan oleh PT, adalah untuk TNB membuktikan sebaliknya (lihat perenggan 13).

(2) Fakta-fakta jelas terjatuh dalam lingkungan proviso peruntukan relevan A 33 Kaedah-Kaedah Mahkamah 2012 ('KKM') bagi relief-relief yang dipohon dalam permohonan semakan kehakiman. Keputusan yang dipersoalkan tersebut jelas bertentangan dengan s 16(2) ABE yang menyatakan dengan jelas terma bahawa keputusan pihak berkuasa negeri, berdasarkan rayuan daripada taksiran PT adalah muktamad (lihat perenggan 14–15).

(3) Dengan membuat keputusan yang dipersoalkan tersebut, EXCO telah melakukan kekhilafan besar dengan bertindak bertentangan dengan s 16(2) ABE yang merupakan undang-undang daripada mana kuasa membuat keputusan wujud. Akibatnya, keputusan yang dipersoalkan tersebut tidak sah dan tiada kesan undang-undang. Keputusan adalah tidak sah dan terbatal *ab initio* (lihat perenggan 23).

(4) Berkenaan permohonan perayu memohon untuk mengisytiharkan apa-apa keputusan sebagai tidak sah dan membatalkannya yang hanya boleh dibuat oleh EXCO pada masa akan datang dan bukannya satu keputusan yang telah dibuat, relief yang dipohon adalah perintah pra-matang yang tidak sepatutnya dibuat dalam semakan kehakiman terhadap keputusan autoriti pentadbiran atau Eksekutif. Ia jelas tidak terjumlah di bawah skop permohonan semakan kehakiman seperti yang digambarkan oleh A 53 k 2(4) KKM 2012 dan selaras dengan tujuan atau

maksud A 53. Agar boleh disemak secara kehakiman dalam prosiding untuk certiorari dan/atau deklarasi, mesti terdapat keputusan sebenar yang wujud yang diadukan yang mana pemohon ingin mencabar dan bukan satu yang mana dijangka akan dibuat pada masa akan datang (lihat perenggan 24).

(5) Berhubung permohonan pemohon untuk menghalang apa-apa keputusan EXCO yang bertentangan dengan kesan keputusan pertamanya bahawa ia adalah muktamad dan konklusif, permohonan bukan sahaja tidak jelas tetapi juga bersifat spekulatif. Bidang kuasa mahkamah dalam prosiding semakan kehakiman tidak termasuk keputusan-keputusan pihak berkuasa Eksekutif akan datang atau yang dijangka yang tidak boleh dihalang daripada menjalankan kuasa-kuasa membuat keputusan yang diberikan kepadanya di bawah undang-undang (lihat perenggan 24).]

Notes

For cases on High Court, see 2(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 5332–5338.

Cases referred to

Amyerma bt Zakaria v Pentadbir Tanah Daerah Batu Pahat & Ors [2012] MLJU 1129; [2012] 1 LNS 406, HC (distd)

Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor [1995] 3 MLJ 369; [1996] 4 CLJ 687, FC (refd)

Ismail bin Abdullah v Tenaga Nasional Bhd [2010] MLJU 1616; [2011] 3 CLJ 770, CA (refd)

M & W Zander Sdn Bhd v Director General of Inland Revenue [2005] 6 CLJ 336 HC (distd)

R v Sloan [1990] 1 NZLR 474, HC (distd)

Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers Union [1995] 2 MLJ 317; [1995] 2 CLJ 748, CA (refd)

Legislation referred to

Electricity Supply Act 1990 ss 11(6), (7), 16(1), 16(2)
Gaming and Lotteries Act 1977 [NZ]
Rules of Court 2012 O 53 rr 2(4), 3(6)

M W Lim (Zain & Co) for the applicant.

Shahrizal bin Shaari (Anis Wahidah Mohamad with him) (State Legal Advisor, Attorney General's Chambers) for the first and second respondents.

Azlan Sulaiman (Amirul Izzat Hasri with him) (Azmi & Assoc) for the third respondent.

Gunalan Muniandy JC:

[1] This application for judicial review arises out of a decision dated 18 July 2012 by the Johor State Executive Council/first respondent ('EXCO') pertaining to a Tenaga Nasional Bhd ('TNB') electrical transmission line project in Gelang Patah, Johor ('the project'). The applicant sought an order of certiorari to quash the decision of the EXCO ('the fourth decision') and a declaration that the said fourth decision and all other decisions of the EXCO pertaining to the project were erroneous, unlawful, illegitimate and *void ab initio*.

FACTUAL BACKGROUND

[2] In order to appreciate the orders prayed for, it is important to be apprised of the chronological background that led to the present application.

[3] The applicant was the owner of 26 parcels of land in the state of Johor ('the lots'). TNB's proposed transmission line project included construction of electrical installations — transmission towers and cables — over the lots owned by the applicant pursuant to the Electricity Supply Act 1990 ('ESA'). Pursuant to an inquiry held under s 11(6) of the ESA on 17 October 1995 and 17 June 1997 the land administrator/second respondent ('LA') assessed the total compensation to be paid by TNB to the applicant for the encroachment into its land under s 16(1) of the ESA at RM11,426,555.75. Both the affected parties attended the inquiry before the LA and were afforded an opportunity to be heard.

[4] Being dissatisfied with the award of the LA, the applicant invoked s 11(7) and s 16(2) of the ESA and applied to the state authority ('EXCO') to review the award of the LA. Vide a letter dated 8 January 2001, the LA invited TNB to put forward evidence and/or a supplementary valuation report for consideration in the applicant's appeal to the EXCO. Upon consideration of the applicant's appeal the EXCO via its decision delivered on 6 February 2002 ('the first decision') increased the compensation payable by TNB to the applicant from approximately by RM11.4m awarded by the LA to RM34,522,099. This decision by the EXCO was not challenged by TNB as no application for judicial review was filed to quash the award.

[5] Vide letters dated 28 April 2002, 30 May 2002, 28 June 2002, 3 September 2002, 11 June 2003 and 11 February 2004, the second respondent duly reminded TNB to satisfy payment of the additional compensation as per the decision of the EXCO. In the letters, TNB was also warned that the non-satisfaction of the additional award amounted to a contravention of the EXCO's decision and could result in legal action being

commenced and a penalty being imposed. TNB, however, did not respond positively to the reminder but instead, vide its letter dated 14 August 2002, without any formal notice or copy to the applicant, appealed to the EXCO to revise its award/first decision. The appeal was purportedly allowed by the EXCO vide letter dated 2 April 2008 (reference R/M Bil 539/2008) wherein the increase in the award of the LA as decided on 6 February 2002 to was revised to a mere 30% which required TNB to merely pay additional compensation of only RM2,735,613 ('the second decision').

[6] After the second decision or revised award, the applicant wrote to the LA on 6 July 2009 notifying him that TNB had yet to settle the additional compensation and asking that the EXCO's first decision be maintained, in response, the EXCO then reverted to its first decision for TNB to pay the applicant a total compensation of about RM34.5m and declared the first decision to be final ('muktamad') and the second decision to be nullified and of no effect ('tidak terpakai dan terbatal') vide notification bearing reference R/M 1351/2009 dated 26 October 2009 ('the third decision'). Consequently, TNB was liable to pay the applicant the original compensation of about RM34.5m.

[7] TNB then applied for judicial review against the EXCO's third decision and succeeded at the High Court in obtaining an order of certiorari to quash this decision. Dissatisfied with the High Court decision, the applicant appealed to the Court of Appeal vide Civil Appeal No J-02–2698–11 of 2011. The EXCO's second decision was brought to the notice of the applicant only when the cause papers of TNB's judicial review application was served on it.

[8] Whilst pending the outcome of the Court of Appeal proceedings, the applicant received a letter dated 20 September 2012 from the LA informing that the EXCO intended to maintain its second decision. This was referred to by the applicant as the fourth decision which was the impugned decision in the present certiorari proceedings. No further inquiry/inquest was held by the EXCO before the impugned decision. Notwithstanding the fourth decision by the EXCO, the Court of Appeal reversed the High Court decision in favour of the applicant thereby affirming the EXCO's first decision.

[9] Despite the Court of Appeal's decision in the applicant's favour ordering TNB to pay the original compensation awarded in the sum of about RM34.5m, this judicial review proceedings was instituted to quash the EXCO's fourth decision and to declare it null and void.

CONTENTIONS OF THE PARTIES

[10] The thrust of the applicant's case was that any decision made under s 16(2) of the ESA is final without any proviso in the governing Act for further

review. Accordingly, the applicant contended that the EXCO's first decision was final and any subsequent decision that was inconsistent with the first decision was null and void. On that score, the EXCO's fourth decision, which is the subject of this judicial review, was rendered null and void.

[11] TNB, on the other hand, contended that there was no decision by the EXCO on 18 July 2012 that was amenable to judicial review. It was further contended that in every judicial review application the onus was on the applicant to prove that there was a decision that was judicially reviewable by the court. In support, the case of *R v Sloan* [1990] 1 NZLR 474 was cited where Hardie Boys J (at p 479) remarked:

> It is not every decision made by statutory authority that is subject to review. A decision must go beyond what is merely administrative or procedural.

(see also *Amyerma bt Zakaria v Pentadbir Tanah Daerah Batu Pahat & Ors* [2012] MLJU 1129; [2012] 1 LNS 406 where *R v Sloan* was applied).

[12] The basis of TNB's contention was, inter alia, that as at 18 July 2012 its judicial review application against the order/decision (the third decision) of the LA to enforce the EXCO's first decision had been allowed by the High Court whilst the applicants' appeal to the Court of Appeal had yet to be heard. Hence, the operative and binding decision as at that date was the revised award dated 2 April 2008 or the second decision. As the High Court order was than effective and enforceable on the matter in dispute, not having been set aside on appeal, there was actually nothing left as it stood for the EXCO to decide. Therefore, the letter of the LA conveying the purported decision of the EXCO on 18 July 2012 was at best to convey the stand of the EXCO that it was maintaining and reaffirming its revised award made on 2 April 2008 which is clear from the conclusion of the letter that makes reference to the aforesaid award. Moreover, the LA's letter appears to be in response to a 'permohonan' or 'rayuan permohonan bantahan pemberian pampasan' from the applicant whereas at the material time there was no appeal by the applicant and it followed that there could be no basis for the decision.

ANALYSIS AND FINDING

[13] First and foremost, from the record, it is indisputable that the EXCO/first respondent made the impugned or fourth decision on 18 July 2012 on the compensation to be awarded to the applicant in respect of the present project payable by TNB. As the decision was conveyed to the applicant in writing vide the relevant ietter issued by the LA, it was for TNB to show to the contrary. Despite there being apparently nothing left at that stage for the EXCO to decide based on the binding and subsisting order of the High Court on TNB'S judicial review application, it did not detract from the fact that on record the EXCO made the impugned decision. The letter of the LA dated

20 September 2012 itself on the face of it is evidence of a decision of the EXCO having been communicated to the applicant as it expressly states 'Keputusan Majlis Mesyuarat Kerajaan ...'. In the face of the clear and explicit words of the said letter communicating the impugned decision to the applicant, the onus was on TNB to prove otherwise that no fourth decision was made by the EXCO in the exercise of its public duty.

[14] The above facts fall squarely within the ambit of the relevant provisions of O 53 of the Rules of Court 2012 ('the ROC') for reliefs to be sought in an application for judicial review. O 53 r 2(4) provides that:

> (4) Any person who is adversely affected by the decision of any public authority shall be entitled to make the application.

Order 53 r 3(6) states that:

> (6) An application for judicial review shall be made promptly and in any event within 40 days from the date when grounds for the application first arose or when the decision is first communicated to the applicant.

Giving the word decision its plain and ordinary meaning there was in this case clearly a decision made in the exercise of a public duty or function that was duly communicated to the applicant.

[15] The applicant rightly pointed out that the cases cited by TNB in support of its contention were distinguishable on the facts. In *R v Sloan* which concerned the Gaming and Lotteries Act 1977 the authority concerned was not empowered by the Act to make a decision but merely to form an opinion and institute the necessary procedures for the court to make a decision. It was held that forming an opinion of this kind was manifestly not reviewable as it plainly did not constitute a decision. In *Amyerma bt Zakaria v PTD Batu Pahat & Ors*, the land administrator merely implemented an order issued by the Court of Appeal directing that the charge be registered and did not make his own decision. In the instant case, on the contrary, power was vested in the EXCO under s 16(2) of the ESA to make a decision and it was in fact the final arbiter of compensation.

[16] Similarly in *M & W Zander Sdn Bhd v Director General of Inland Revenue* [2005] 6 CLJ 336, the purported 'decision' merely involved on 'indication by officers of the IR Board as to how they compute ... chargeable income'. The High Court in giving 'decision' its plain and ordinary meaning to avoid absurdity that would result in unfairness rightly held that it could not amount to a decision that was judicially reviewable. Taking this approach as correctly adopted, the impugned decision was for all intents and purpose a decision made by the EXCO pursuant to its statutory powers and not merely an administrative act.

[17] Coming now to TNB's contention that the EXCO's fourth decision was superfluous as TNB's JR application against its third decision was allowed by the High Court whose decision was then still pending appeal, the reasoning was in my view flawed and untenable. Going by TNB's argument, the first decision of the EXCO made upon proper adjudication of the applicant's appeal against the LA's award under s 16(2) of the ESA should prevail and all subsequent decisions including the revised award via the second decision should likewise be negated and disregarded. However, TNB did not adopt the stand that the second decision of the EXCO which was in its favour should be invalidated by the existence of the EXCO's first decision which was made in accordance with law that rendered it final. Moreover, the EXCO's second decision was overturned by the Court of Appeal and thus, rendered nugatory and of no effect.

[18] On TNB's contention that as there was no application or appeal by the applicant for the EXCO to make a decision on 18 July 2012 there was, thus no proper decision made that was reviewable. The contents of the letter dated 20 September 2012 communicating the decision ought to be construed in resolving this issue, it cannot be gainsaid that the letter refers explicitly to a 'keputusan' or decision of the EXCO, the meaning of which is plain and obvious without any hint of vagueness. The letter states unequivocally that the EXCO had made a decision at its meeting on 18 July 2012 bearing reference 'Ringkasan Mesyuarat Bil 1567/2012' to dismiss the appeal or application objecting to the award of compensation and to maintain the decision of the government made on 2 April 2008 at the meeting Bil 539/2008 (second decision). Notwithstanding that there was then no appeal or application for the EXCO to decide, there was a decision made that was subject to judicial review, the correctness or basis of which was the very subject of this proceedings. The contention that the fourth decision of the EXCO, on which this judicial review application is premised, was non-existent and not reviewable, therefore, fails.

[19] The impugned decision was clearly in contravention of s 16(2) of the ESA which states in clear and unequivocal terms that the decision of the state authority on an appeal from the LA's assessment shall be final. Section 16 (2) provides that:

> (2) Any person aggrieved with the District Land Administrators assessment may within twenty-one days after the assessment appeal to the State Authority whose decision shall be final.

According to the words of s 16(2) given their plain and ordinary meaning and a mandatory interpretation, the finality of the state authority's decision therein is beyond dispute. In the Court of Appeal case of *Ismail bin Abdullah v Tenaga Nasional Bhd* [2010] MLJU 1616; [2011] 3 CLJ 770 which also concerned s 16(2) of the ESA arising out of an appeal from an assessment by the deputy

land administrator to the State Authority of Kedah, the court held:

> A mandatory interpretation must be accorded to the word 'shall' that appears in s 16(2) of the Electricity Supply Act 1990.

Further, that:

> ... Here, we have s 16(2) of the Electricity Supply Act 1990 which states that the decision of the State Authority shall be final and effect must be given to it. Public policy too demands that finality to the decision of the State Authority be recognised.

[20] The Court of Appeal went on to hold that the finality of the decision of the state authority under s 16(2) rendered it non-reviewable by the court as follows:

> In holding that the award by the MMK was excessive, the learned JC was indirectly reviewing the decision of the MMK. In our judgment, the learned JC has no power to do so. This is another instance where His Lordship erred ... The learned JC relied on the valuation report of the respondent and held that the award by the MMK was excessive. But the Electricity Supply Act 1990 does not make any provision for an award by the MMK to be challenged since the MMK's decision is final.

[21] As the EXCO had exercised the powers vested in it under s 16(2) of the ESA on the appeal against the district LA's assessment and made a final decision on 6 February 2002, it had acted contrary to law and exceeded its jurisdiction in readjudicating the matter and making the fourth ('impugned') decision on 18 July 2012 that conflicted with its final decision. More so, as the dispute as to its third decision, which was the subject of judicial review, was pending decision before the Court of Appeal at that point in time. Having accorded a mandatory interpretation to s 16(2) of the ESA, I held that the EXCO was functus officio upon having heard the appeal and delivered its decision in the exercise of its quasi-judicial powers. It had no powers to review its own decision and alter it thereafter. It had therefore, committed an error of law that went to jurisdiction in subsequently reconsidering the matter and making a contrary decision.

CONCLUSION

[22] It is trite law that a decision making authority exercising a quasi judicial function has no jurisdiction to commit an error of law or contravene the law from which it derives its decision making powers. The principle was expressed by the Federal Court in *Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor* [1995] 3 MLJ 369; [1996] 4 CLJ 687 where the following passage from *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers Union* [1995] 2 MLJ 317; [1995] 2 CLJ 748 was cited with approval:

> An inferior tribunal or other decision-making authority, whether exercising a quasi-judicial function or purely an administrative function, has no jurisdiction to

commit an error of law. Henceforth, it is no longer of concern whether the error of law is jurisdictional or not. If an inferior tribunal or other public decision maker does make such an error of law then he exceeds his jurisdiction. So too is jurisdiction exceeded, where resort is to an unfair procedure (see *Raja Abdul Malek Muzaffar Shah bin Raja Shahruzzaman v Setiausaha Suruhanjaya Pasukan Polis* [1995] 1 MLJ 308; [1995] 1 CLJ 619), or where the decision reached is unreasonable, in the sense that no reasonable tribunal similarly circumstanced would have arrived at the impugned decision.

It is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law, for the categories of such an error are not closed. But it may be safely said that an error of law would be disclosed if the decision maker asks himself the wrong question or takes into account irrelevant considerations or omits to take into account relevant considerations (what may be termed an Anisminic error) or if he misconstrues the terms of any relevant statute, or misapplies or misstates a principle of the general law.

[23] For the aforesaid reasons, I concluded that by making the impugned decision the EXCO had committed a serious error of law by acting in contravention of s 16(2) of the ESA which was the law from which its decision making powers were derived. As a consequence, the impugned decision was invalid and of no legal effect. I, accordingly, made the declaration that the decision was null and *void ab initio* and issued an order of certiorari to have it quashed. I also awarded costs of RM15,000 to the applicant and damages to be assessed by the registrar.

[24] With regard to prayer (ii) of the applicant's originating summons where it seeks to declare void and nullify any decision that may be made by the first respondent ('EXCO') in the future and not one that has already been made, I found merit in TNB's contention that the relief sought was a pre-emptive order that should not be made in a judicial review of the decision of an administrative or Executive authority. It clearly did not fall within the scope of a judicial review application as envisaged in O 53 r 2(4) of the ROC 2012 and ran counter to the purpose or intent of O 53. To be judicially reviewable in proceedings for certiorari and/or declaration, there must be an actual existing decision complained of that the applicant wishes to challenge and not one that is anticipated would be made in the future. In this prayer, the applicant also seeks to prohibit any future decision of the EXCO that conflicts with the effect of its first decision that is final and conclusive. This is not only vague but speculative in nature as well and as argued by TNB the question of conflict alluded to is a matter of judicial interpretation as and when the occasion arises when a new decision is made and a fresh challenge mounted. In short, the court's jurisdiction in judicial review proceedings does not extend to future or anticipated decisions of the Executive authority which cannot be restrained from exercising the decision making powers vested in it under the law. The ambit of O 53 of the ROC which governs judicial review applications is crystal

clear as stipulated in O 53 r 2(4) that for a person to be qualified to make the application he must be adversely affected by the decision, act or omission in relation to the exercise of the public duty or function. It certainly doesn't encompass any future or anticipated decision, act or omission by the authority concerned. In the circumstances, I dismissed the application for the reliefs sought in prayers 1(ii) and 2 to invalidate any future decision of the first respondent referred to therein and to restrain it from exercising its decision making powers.

Application allowed in part.

Reported by Kanesh Sundrum